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Udayakumar a/l Suppiah v Ganga Tharan a/l Shanmugam

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HIGH COURT (KUALA LUMPUR) — NO D10–22–1526 OF 2007
AMELIA TEE ABDULLAH JC
14 OCTOBER 2010

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Contract — Collateral contract — Nature of — Whether agreement to retransfer shares constituted collateral contract — Whether proviso to s 92 of the Evidence Act 1950 applicable — Whether form of transfer of securities amounted to acknowledgment of receipt of consideration stated therein — Evidence Act 1950 s 92

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Evidence — Oral agreement — Whether oral assurance admissible to vary or add to terms of written contract — Whether proviso to s 92 of the Evidence Act 1950 applicable — Evidence Act 1950 s 92

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While the plaintiff was working as a subcontractor of Aneka Pipecon Engineering he became acquainted with the defendant, who was working as a quantity surveyor for the same company. The plaintiff and defendant incorporated a company known as Water Path ('WP'), in which they were both directors. The defendant held 51% of the shares in WP while the plaintiff held

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49% of the shares in it. WP became in need of funds when it secured certain jobs from Kuala Sidin Sdn Bhd ('KSSB'), and thus applied for bank loans of RM1m from Bumiputra Commerce Bank and RM500,000 from RHB Bank. When the loans were being processed, a credit check on the plaintiff revealed that he was blacklisted. According to the plaintiff he was informed by the

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defendant that the loans were rejected because the plaintiff was blacklisted and that the loans would be approved if a fresh application was made without the plaintiff as a shareholder and director. In the light of these circumstances steps were taken to restructure WP which resulted in the plaintiff's resignation as director and the transfer of 115,000 shares or 46% of the shareholding interest

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in WP from the plaintiff to the defendant. It was the plaintiff's case that this arrangement was to be a temporary one and that the defendant would hold the plaintiff's shares as trustee until the bank loans were approved. The plaintiff also claimed that he would get back his director's position when the loans were approved. The defendant's version of the events which led to the transfer of the

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115,000 shares was somewhat different. According to the defendant, when he found out that the plaintiff was blacklisted he had asked him to resolve his financial issues and when the latter failed to do so he informed him that he could not be a director of WP if the company were to move forward. The defendant further alleged that it was the plaintiff who suggested that he resolve

his financial issues by selling his shares. Thereafter the defendant claimed that although he wanted to buy all 49% of the plaintiff's shares, the plaintiff was only agreeable to selling 115,000 shares in WP representing 46% of the total shares of WP. Subsequently the defendant allegedly paid the plaintiff a sum of RM115,000 at RM1 per share and the plaintiff executed the transfer of shares in favour of the defendant. Although the plaintiff did not dispute signing the transfer forms he contended that no monies changed hands and that the shares were not sold to the defendant. The plaintiff also denied that he was asked to leave as director because the defendant had acquired 115,000 shares from him. The plaintiff thus commenced the present action against the defendant for a declaration that the defendant was holding the 115,000 shares in WP on trust for him and for an order that the defendant transfer back to him the 115,000 shares in WP, damages for breach of trust and costs. The plaintiff contended that there was no sale of the shares and that he had not received any consideration for the transfer of the shares because according to the arrangement between them the defendant was to hold the said shares as trustee until the bank loans were approved. However, the plaintiff was unable to produce any written document that would reflect the alleged arrangement between him and the defendant to transfer the shares temporarily pending the approval of the bank loans. The defendant, who disputed the plaintiff's claim, contended that the 115,000 shares were sold to him and that he had paid the plaintiff RM115,000 in cash at the plaintiff's request. The defendant's witness, one Tam Ngan Sang, a contractor for WP testified that he witnessed the plaintiff and defendant signing the forms for the transfer of the 115,000 shares in WP, which he in turn had signed as a witness. This witness also confirmed lodging two police reports against the plaintiff for threatening the workers of WP and a separate incident of abusing him with vulgar words.

Held, allowing the plaintiff's claim:

(1) The fact that the defendant held 51% of the shares as opposed to 49% by the plaintiff as well as the fact that the business address of WP was the defendant's place of residence pointed to the defendant being the one who had started WP (see para 63).

(2) Upon a careful consideration of the evidence in respect of the reasons for the transfer of the shares it was found that the plaintiff's evidence was in complete and total variance with that of the defendant and his witnesses. Nevertheless, it was found that at the material time the status of the plaintiff as one who was blacklisted was not conducive to his remaining as a director and shareholder of WP and would have necessitated the transfer of his shares in WP to enable WP to secure banking facilities to carry out the KSSB project (see paras 64–68).

(3) The plaintiff was unable to produce any document to reflect the alleged arrangement because the arrangement was only a verbal agreement and

understanding. Although an assurance is as a general rule not admissible to vary or add to the terms of a written contract, an assurance given in the course of negotiations may be treated as a separate contract, collateral to the main transaction. Looking at the plaintiff's evidence in the light of the growing body of authorities which supported the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts, it was found that quite apart from the document of transfer there was an agreement between the parties that the shares would be re-transferred after the loans were approved or when the plaintiff wanted them back. This agreement between the parties as regards the re-transfer of the shares constituted a collateral contract which was capable of existing side by side with the main contract. Alternatively, the case fell within the proviso to s 92 of the Evidence Act 1950, in that, the facts sought to be adduced by the plaintiff would prove that there was a want or failure of consideration as the total of RM115,000 in respect of the transfer documents was not paid. As the fact of the execution of the transfer forms was not disputed, but the validity of the document was challenged, parol evidence as regards the circumstances leading to the arrangement between the parties at the time of execution of the documents was material, relevant and admissible. Based on an evaluation of the evidence of plaintiff it was found that the plaintiff had proved the existence of facts in favour of his case (see paras 74–75, 77–78 & 80).

(4) Although the plaintiff had always maintained that the transfer of his shares to the defendant was on a temporary basis until the loan was approved, the defendant had failed to plead from the outset that the plaintiff had sold the 115,000 shares to him for a sum of RM115,000. Further, the evidence of the money in cash being carried in a black computer bag as testified by the defendant and his witnesses smacks of complicity and concoction. The defendant's evidence that he had RM20,000 in the house for business purposes and borrowed the balance of RM95,000 from four other persons also appeared quite unbelievable since none of the four had documentary or other proof of the source of the monies they had loaned to the defendant. The most important factor is the lack of a document acknowledging receipt of the RM115,000. The form of transfer of securities did not amount to an acknowledgment of receipt of the consideration stated therein or proof that the said sum was in fact received by the plaintiff. Based on these considerations, it was found that the defendant had failed to prove on a balance of probabilities that he had paid RM115,000 in cash to the plaintiff for the latter's 46% shares in WP (see paras 90–99).

[Bahasa Malaysia summary

Semasa plaintif bekerja sebagai subkontraktor dengan Aneka Pipecon Engineering, dia berkenalan dengan defendan, yang bekerja sebagai juruukur

bahan di syarikat yang sama. Plaintif dan defendan menubuhkan sebuah syarikat yang dikenali sebagai Water Path ('WP'), di mana mereka merupakan pengarahnya. Defendan memegang 51% saham WP dan plaintif memegang 49% saham di dalamnya. WP memerlukan bantuan kewangan apabila ia mendapat kerja-kerja tertentu daripada Kuala Sidin Sdn Bhd ('KSBB'), dan oleh itu memohon pinjaman bank sejumlah RM1 juta daripada Bumiputra Commerce Bank dan RM500,000 daripada RHB Bank. Apabila pinjaman-pinjaman tersebut sedang diproses, semakan kredit plaintif mendedahkan bahawa dia telah disenarai hitamkan. Menurut plaintif, dia dimaklumkan oleh defendan bahawa pinjaman-pinjaman tersebut ditolak kerana plaintif disenarai hitamkan dan bahawa pinjaman-pinjaman tersebut akan diluluskan jika permohonan baru dibuat dan plaintif bukan lagi pemegang saham dan pengarah. Berikutan keadaan ini, langkah-langkah diambil untuk penstrukturan semula WP yang mengakibatkan plaintif meletak jawatan sebagai pengarah dan pemindahan 115,000 saham atau 46% kepentingan pemegangan saham dalam WP daripada plaintif kepada defendan. Adalah kes plaintif bahawa aturan tersebut hanyalah untuk sementara waktu dan defendan akan memegang saham plaintif sebagai pemegang amanah sehingga pinjaman-pinjaman bank diluluskan. Plaintif juga mendakwa bahawa dia akan menjawat semula jawatan pengarah apabila pinjaman-pinjaman tersebut diluluskan. Versi defendan tentang kejadian yang menjurus kepada perpindahan 115,000 saham tersebut sangatlah berbeza. Menurut defendan, apabila dia mendapati bahawa plaintif disenarai hitamkan, dia meminta plaintif menyelesaikan masalah kewangannya dan apabila plaintif gagal berbuat begitu, dia memaklumkan plaintif bahawa ia tidak boleh menjadi pengarah WP jika syarikat tersebut ingin maju. Defendan seterusnya mendakwa bahawa plaintiflah yang mencadangkan untuknya menyelesaikan masalah kewangannya dengan menjual saham-sahamnya. Kemudiannya, defendan mendakwa, walaupun dia mahu membeli kesemua 49% saham plaintif, plaintif hanya bersetuju menjual 115,000 saham WP yang mewakili 46% keseluruhan saham WP. Seterusnya, defendan dikatakan membayar plaintif sejumlah RM115,000 pada harga RM1 sesaham dan plaintif menyempurnakan pindah milik saham kepada defendan. Walaupun plaintif tidak mempertikaikan menandatangani borang-borang pindah milik, dia menghujah bahawa tiada pembayaran dibuat dan saham tersebut tidak dijual kepada defendan. Plaintif juga menafikan bahawa dia diminta berhenti daripada jawatan pengarah kerana defendan telah memperoleh 115,000 saham daripadanya. Oleh itu plaintif memulakan tindakan ini terhadap defendan untuk perisytiharan bahawa defendan memegang 115,000 saham dalam WP sebagai amanah bagi pihaknya dan untuk suatu perintah bahawa defendan memindahkan semula 15,000 saham dalam WP kepadanya, ganti rugi bagi pecah amanah dan kos. Plaintif berhujah bahawa tiada penjualan saham dan dia tidak menerima apa-apa balasan untuk pindah milik saham tersebut kerana menurut aturan yang dibuat antara mereka, defendan memegang saham tersebut sebagai pemegang amanah sehingga pinjaman-pinjaman bank

diluluskan. Walau bagaimanapun, plaintif tidak boleh mengemukakan sebarang dokumen bertulis yang menyatakan perjanjian yang dikatakan antara mereka untuk memindahkan saham tersebut untuk sementara waktu sementara menunggu kelulusan pinjaman-pinjaman bank. Defendan, yang menyangkal tuntutan plaintif, menghujahkan bahawa 115,000 saham tersebut telah dijual kepadanya dan dia telah membayar kepada plaintif sejumlah RM115,000 secara tunai atas permintaan plaintif. Saksi defendan, Tam Ngan Sang, kontraktor WP memberi keterangan bahawa dia menyaksikan plaintif dan defendan menandatangani borang-borang memindah milik 115,000 saham dalam WP, dan dia menandatangani borang-borang tersebut sebagai saksi. Saksi ini juga mengesahkan melaporkan dua laporan polis terhadap plaintif kerana mengugut pekerja-pekerja WP dan satu kejadian lain, plaintif mencacinya dengan kata-kata kesat.

(1) Fakta bahawa defendan memegang 51% saham sementara plaintif memegang 49% dan juga fakta bahawa alamat perniagaan WP adalah kediaman defendan menunjukkan bahawa defendan yang memulakan WP (lihat perenggan 63).

(2) Melalui pengamatan yang teliti atas keterangan berkaitan sebab-sebab pindah milik saham, didapati bahawa keterangan plaintif sangatlah berbeza dengan keterangan defendan dan saksinya. Namun begitu, didapati bahawa pada masa yang material itu, status plaintif yang disenarai hitamkan tidak membantunya untuk terus menjadi pengarah dan pemegang saham WP dan memerlukan pindah milikan sahamnya dalam WP agar membolehkan WP mendapat kemudahan perbankan bagi menjalankan projek KSSB (lihat perenggan 64–68).

(3) Plaintif tidak boleh mengemukakan sebarang dokumen yang menunjukkan perjanjian yang dikatakannya disebabkan perjanjian tersebut hanyalah secara lisan dan persefahaman pihak-pihak. Walaupun suatu jaminan, sebagai peraturan amnya tidak boleh diterima untuk mengubah atau menambah terma-terma kontrak bertulis, jaminan yang diberikan semasa perbincangan boleh dianggap sebagai kontrak yang berasingan, sebagai sandaran kepada transaksi utama. Melihat kepada keterangan plaintif, berdasarkan autoriti-autoriti yang kian berkembang yang menyokong usul bahawa perjanjian kolateral boleh wujud seiring dengan perjanjian utama, walaupun bercanggahan, adalah didapati bahawa selain daripada dokumen pindah milik, terdapat perjanjian antara pihak-pihak bahawa saham akan dipindahkan semula selepas pinjaman-pinjaman diluluskan atau apabila plaintif mahukannya semula. Perjanjian antara pihak-pihak berkaitan memindahkan semula saham adalah kontrak kolateral yang boleh wujud seiring dengan kontrak utama. Secara alternatifnya, kes ini terangkum dalam proviso s 92 Akta Keterangan 1950, iaitu fakta-fakta yang dipohon untuk dikemukakan

oleh plaintif akan membuktikan bahawa terdapat ketiadaan atau kegagalan balasan kerana jumlah RM115,000 yang berkaitan dokumen-dokumen pindah milik tersebut tidak dibayar. Memandangkan fakta penyempurnaan borang-borang pindah milik tidak dipertikaikan, tetapi kesahan dokumen itu yang dipersoalkan, keterangan lisan berikutan keadaan yang menjurus kepada pengaturan antara pihak-pihak pada masa penyempurnaan dokumen-dokumen adalah material, relevan dan boleh diterima. Berdasarkan penilaian keterangan plaintif, didapati bahawa plaintif telah membuktikan kewujudan fakta-fakta yang menyokong kesnya (lihat perenggan 74–75, 77–78 & 80).

(4) Walaupun plaintif sentiasa menegaskan bahawa pindah milik sahamnya kepada defendan hanyalah untuk sementara waktu sehingga pinjaman-pinjaman diluluskan, defendan gagal memplid sejak permulaan bahawa plaintif telah menjual 115,000 saham kepadanya untuk RM115,000. Selanjutnya, keterangan bahawa wang tunai dibawa dalam beg komputer berwarna hitam seperti yang dikatakan defendan dan saksinya, betul-betul merupakan persubahatan dan diada-adakan. Keterangan defendan bahawa dia mempunyai RM20,000 di rumahnya untuk tujuan perniagaan dan meminjam RM95,000 selebihnya daripada empat orang juga kelihatan sukar untuk dipercayai kerana keempat-empat orang itu tiada keterangan dokumentar atau lain-lain bukti dari mana sumber wang yang dipinjamkan kepada defendan. Faktor paling penting ialah ketiadaan dokumen akuan penerimaan RM115,000 itu. Borang pindah milik jaminan bukanlah bukti akuan penerimaan balasan yang dinyatakan atau bukti bahawa jumlah tersebut diterima plaintif. Berdasarkan pertimbangan-pertimbangan ini, didapati bahawa defendan gagal membuktikan atas imbangan kebarangkalian bahawa dia telah membayar RM115,000 secara tunai kepada plaintif bagi 46% saham miliknya dalam WP (lihat perenggan 90–99).]

Notes

For a case on admissibility of oral agreement, see 3(1) *Mallal's Digest* (4th Ed, 2010 Reissue) para 1981.

For cases on nature of collateral contract, see 7(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3080–3082.

Cases referred to

Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng [2005] 1 MLJ 101, FC (distd)

International Times & Ors v Leong Ho Yuen [1980] 2 MLJ 86, FC (folld)

Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight [1983] 1 MLJ 220; [1983] CLJ (Rep) 394, FC (refd)

Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (folld)

A *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 1 MLJ 89; [1979] 1 LNS 113, FC (refd)

Legislation referred to

Companies Act 1965 s 103(1) Form 32A
B Evidence Act 1950 s 92

M Manogar (Manogar & Co) for the plaintiff.
K Ganesan (Muhammad Ganesan & Nazri) for the defendant.

C **Amelia Tee Abdullah JC:**

[1] The claim of the plaintiff, Udayakumar a/l Suppiah, is for a declaration and orders arising out of his business relationship with the defendant and the transfer of 115,000 shares in Water Path Sdn Bhd ('Water Path'). The plaintiff's D claim is disputed by the defendant, Ganga Tharan a/l Shanmugam, who contends instead that the 115,000 shares were sold to him and the plaintiff was therefore not entitled to the relief sought.

E THE ISSUES

[2] The main issues as agreed between the parties can be placed under two broad areas as follows:

F (a)
(i) Whether the plaintiff had sold 46% of the shares in Water Path (amounting to 115,000 shares) to the defendant at a price of RM1 per share;

(ii) Whether the plaintiff had been paid RM115,000 by the defendant for the transfer of his shares in Water Path;

G (iii) If the plaintiff had transferred 115,000 shares in Water Path to the defendant, what was the purpose of the sale?

(b) Was the plaintiff entitled to the return of the 115,000 shares.

H THE PLAINTIFF'S CASE

[3] The plaintiff, Udayakumar a/l Suppiah, was first acquainted with the defendant in 1997. He was then doing sub-contract work for a company called Aneka Pipecon Engineering ('Aneka Pipecon') where the defendant was then I working. He was insistent that the defendant was the QS in Aneka Pipecon and not the contract manager.

[4] Water Path was formed by the plaintiff and the defendant in 1999. From the agreed facts, the court notes that when Water Path was first incorporated, the plaintiff held 2,450 shares (49%) and the defendant 2,550 shares (51%). In April 2004, the share capital was increased to 250,000 with 122,500 shares being held by the plaintiff and 127,500 shares by the defendant. The company was in the business of installation of water pipes, water tanks, structure and maintenance.

[5] The court notes that the plaintiff had to correct his answers many times during cross-examination. Among the many instances recorded were the following:

(a) He first testified that it was he who formed Water Path. He later agreed that that was not accurate and that Water Path was in fact formed by both the defendant and himself;

(b) He testified that the initial paid up capital of the Water Path was RM2. When referred to an extract of the M & A at p 31 of AB1, he agreed that his answer was not true and that the initial paid up capital of the company was RM5000;

(c) He then testified that the current paid up capital of Water Path was RM150,000. When shown p 11 of AB1 which shows that the total number of shares in the company was 250,000, he agreed that his earlier answer was incorrect.

The court had to warn the plaintiff about the number of times that he had to correct his answers.

[6] The plaintiff claimed that it was he who had brought the defendant into the company. When cross-examined as to how the defendant came to hold majority shares if it was the plaintiff who had brought the defendant into the company, he offered the explanation that he had his own company called Barcon Construction ('Barcon'). The understanding between the parties was that whatever jobs were obtained by Water Path would be given to Barcon to do under sub-contract. The defendant was given more shares because the plaintiff would gain under both Water Path and Barcon.

[7] According to the plaintiff, both he and the defendant had been handling the day-to-day running of Water Path since its incorporation. Although the business address appearing in the SSM documents is given as 85, Jalan Dato Senu 31, Taman Dato Senu, Sentul, Kuala Lumpur, which was the defendant's address, the plaintiff insisted that that address was maintained only for letters and that he never once went to the defendant's house to carry on business there. It is his evidence that Water Path had no office premises and that they would meet at the stalls.

[8] The plaintiff testified that Water Path had secured some good contracts from Boustead Plantations in 2004. During cross-examination, he agreed that the contracts were actually from Kuala Sidin Sdn Bhd and not Boustead Plantation. They needed money to start the jobs and thus applied for a bank loan of RM1m from Bumiputra Commerce Bank ('BCBB') and RM500,000 from RHB Bank. The loan applications were made in June 2004. When queried as to who had approached the banks for the loans, his answer was 'both of us'. However, the plaintiff was unable to recall the names of the officers from BCBB and RHB Bank that they had approached.

[9] When the loans were being processed, a credit check on the plaintiff showed that he was blacklisted. The banks were unable to approve the loans because of his credit status. The plaintiff agreed during cross-examination that he had been adjudged a bankrupt on 30 December 2004 following a judgment obtained against him by AmBank Berhad in 2002 or 2003. However he did not agree that it was because of this that he had asked for payments to be made to him in cash as he feared that the bank would freeze or seize his money.

[10] The plaintiff testified that he was informed by the defendant that the loan could be approved if a fresh application was made without him as a shareholder and director. In light of this development, they took steps to restructure the company. The plaintiff resigned as a director on 6 October 2004 and transferred 115,000 shares (46%) in Water Path to the defendant, retaining only 7,500 shares (3%). Nadarajan a/l Subramaniam, who was in charge of the accounts in Water Path, replaced the plaintiff as director. This restructuring is reflected in the SSM documents of Water Path at pp 8–11 of AB1. According to the plaintiff, the arrangement between them was that the defendant would hold the plaintiffs shares as trustee until the bank loans were approved or until such time when he wanted them back. He was also to get back his director's position when the loans were approved or whenever he wanted. He denied that he was asked to leave as a director on 6 August 2004 because the defendant had acquired 115,000 shares from him.

[11] The plaintiff was asked whether there were conditions *in writing* attached to his resignation. Although he answered in the affirmative, he was unable to show the document concerned. What he did was to refer to the letter that was signed by Nadarajan (p 68) dated 27 July 2006. In light of the fact that the plaintiffs resignation was on 6 August 2004, p 68 of AB1 could not conceivably be a document containing the conditions attached to his resignation some two years earlier.

[12] The plaintiff testified that the Forms 32A for the transfer of shares were signed by him on 6 August 2004 at the company's office in Diamond Square, Kuala Lumpur. Only the plaintiff and the defendant were present in the office

room at the time of the signing. Nadarajan was at his desk in the front office area. The transfer of shares is reflected in the transfer documents at pp 15–19 of AB1. The number of shares transferred vide p 15 is 17,000, for pp 16 and 17 it is 49,000 shares each. The total number of shares transferred is 115,000. Apart from the transfer documents, there was no other document to show the arrangements between the parties. As the plaintiff puts it:

> *It was only a verbal agreement and understanding between me and the defendant as I trusted the defendant.*

He explained that no monies were paid for the transfer of the shares as the defendant was only to hold the shares for him temporarily. In cross-examination, he confirmed that 'the share transfer was done correctly'. He agreed that although he had sold his shares, *he did not get any money then or at any time*. However, he had to admit that at that time, he did not lodge any police report to complain that the shares were transferred fraudulently and without consideration.

[13] The plaintiff claimed that he was only aware that the transfer forms were stamped a few weeks after he had signed them. He agreed that he did not lodge any police report to say that Tam Ngan Seng had not witnessed his signature nor did he take any steps to challenge the validity of these forms. According to him, Tam Ngan Seng was a subcontractor whom he had introduced to Water Path. Even after he came to know that Tam Ngan Seng was allegedly a witness to his signature on the transfer forms, he did not contact him.

[14] The plaintiff at first testified that the loans were approved by the two banks between October 2004 and March 2005. However, the court notes that during cross-examination, his evidence changed somewhat when he said that the loans were approved in September to December 2004. He also said that he did not take any steps to enquire, ensure or confirm that the company had repaid the two loans taken from BCBB and RHB Bank because he was not a director. He agreed that since the date the loans were taken, it was the defendant who was responsible for seeing that they were repaid.

[15] The plaintiff said that sometime in 2006, he asked the defendant to transfer back his shares as well as to re-appoint him as a company director. Initially, the defendant delayed but subsequently refused to do so.

[16] During cross-examination, the plaintiff was referred to the attendance list for the fifth general meeting of Water Path. Although his name and signature appears in the list of those present, the plaintiff denied that he attended the said meeting but claimed that he signed the list in his room. Similarly, he denied that he attended the sixth general meeting although his

name and signature appears in the list of those present. When asked, he told the court that he did not write to the company secretary to protest that he did not attend the said meetings 'because I trusted the defendant'. He claimed that he had asked the defendant to be reinstated as a director although this was not reflected in the minutes of the annual general meeting.

[17] The plaintiff identified the acknowledgement at p 68 of AB1 as that made by Nadarajan a/l Subramaniam ('Nadarajan') regarding the arrangement between the plaintiff and the defendant. The acknowledgement was dated 27 July 2006. The plaintiff explained that it was only dated July 2006 because initially the defendant had only delayed the transfer back of the shares and his reappointment as a director. However as time went on, he realised that the defendant had no intention to return his shares or to reappoint him as company director. It was then that he approached Nadarajan to give him this letter as he wanted to secure his shares and his position. According to him, Nadarajan knew the full background of the arrangement between the plaintiff and the defendant and he had agreed to give the acknowledgment after several meetings in which the plaintiff had pleaded for his help. He denied forcing or threatening Nadarajan to sign the acknowledgment but maintained that he did so voluntarily.

[18] The acknowledgement was signed in front of the plaintiff and witnessed by Mr Jaya Sangaran at a coffee house in front of Chilies at the Bangsar Shopping Centre. The plaintiff's son was also present. During cross-examination, he admitted that the letter was prepared by Jaya Sangaran and that only the name 'Nadarajan a/l Subramaniam' was written by Nadarajan. Both signatures on the left were signed by Nadarajan. Despite being shown the police report lodged by Nadarajan at p 69 of AB1, he disagreed that Nadarajan had lodged a police report on 8 August 2006 that he was forced to sign the said letter. He also claimed that he was not aware that Nadarajan had made a statutory declaration on 2 August 2006 affirming that he was forced by the plaintiff to sign the letter dated 27 July 2006.

[19] The plaintiff claimed that from the time he resigned as director and temporarily transferred his shares to the defendant, he had nevertheless continued with his job in the company and continued to sign the company's cheques until 2006 when he was he was refused entry into his office. On 6 August 2004, Water Path had accounts with Hong Leong Bank, Jalan Chow Kit branch as well as Alliance Bank, Kajang branch. The plaintiff had been a signatory of these two accounts before his resignation and continued signing cheques for those accounts until 2006. However, he was not a signatory to the company's two other accounts (BCBB 85 RHB). He did ask the defendant about being a signatory to the other two accounts but the defendant said that

he could not because he was not a director or a major shareholder and furthermore, he was blacklisted. The plaintiff said that he did not insist on being a signatory.

[20] The plaintiff testified that when the defendant refused to return his shares and reappoint him as director, their relationship became bad. Physical fights took place and both of them lodged several police reports. The plaintiff was shown the police report lodged by Susela a/p Apparao, a staff of Water Path (p 45 of AB2), and he admitted being aware of the police report lodged against him on 26 July 2006 for harassment. However, he claimed not to be aware of other police reports lodged by the defendant against him on 6 August 2006, 5 October 2006 and 30 October 2006 (AB2 pp 46,47 and 49) or that Tam Ngan Sang had lodged police reports against him on 26 July 2006 and 25 June 2010 (AB2 pp 58 & 59).

[21] On 23 May 2007, his lawyer sent a notice of demand to the defendant demanding for the value of 49% of the shares of Water Path in monetary terms, dividends, and profits from 2004. There was no response from the defendant. During cross-examination, the plaintiff agreed that since the 115,000 shares transferred to the defendant only represented 46% of the shares of Water Path, that part of his lawyer's letter stating that he was the legal and beneficial owner of *49%* of the shares was incorrect. In any event, the court notes that certain of the plaintiff's prayers, including asking for an account of the value of 49% of the shares of Water Path, were abandoned or not proceeded with during the course of the hearing. In the final analysis, what the plaintiff was asking from the court was for a declaration that the defendant was holding the 115,000 shares in Water Path in trust for him, for an order that the defendant transfer back the 115,000 shares back to him within 7 days from the date of the order, damages for breach of trust, dividends on the 46% shares from 2004 and costs.

[22] The plaintiff called as his witness Jaya Sangaran a/l Muniandy ('PW2'). PW2 had known the plaintiff since 2002 when he played football in PW2's team. He had known since July 2006 that the plaintiff and the defendant were managing a company called Water Path and he was aware of the problems between them.

[23] PW2 testified that the entire acknowledgment dated 27 July 2006 at p 68 of AB1 was prepared by him except for the name of Nadarajan, the IC No and the words below 'Yours Truly' which were written by Nadarajan. The acknowledgement was prepared at the request of the plaintiff. He prepared the text when he was alone in his office.

[24] PW2 was neither a director nor a shareholder of Water Path. When asked how he possessed the necessary knowledge as to what had transpired in

the company, he offered the explanation that prior to the preparation of the text, he had met with the plaintiff and Nadarajan at KFC Brickfields. The purpose of Nadarajan being there was to tell PW2 about what had transpired. According to him, Nadarajan had 'volunteered and came or else he would not have been there'. However, he agreed that this fact did not appear in his witness statement.

[25] According to PW2, Nadarajan signed the acknowledgement in front of him at the Bangsar Shopping Centre. The plaintiff's son was also present at the time. The atmosphere was cordial. He testified that Nadarajan appeared normal and not under any visible stress. He did not express any reservations about signing the document. However, PW2 agreed that if there had been threats imposed on Nadarajan by the plaintiff; he would not have knowledge about that. His role at the signing was merely to act as the witness to Nadarajan's signature. He agreed that these matters had legal consequences and claimed that they had wanted to engage a lawyer but 'were short of time'.

[26] PW2 testified that when he drafted the text, he knew that the share transaction was between the plaintiff and the defendant and that Nadarajan was not involved. He admitted that he did not ask Nadarajan whether he witnessed the sale and the transfer of the shares and agreed that he would not know whether Nadarajan was aware of what had transpired during the transfer and sale of the shares.

[27] PW2 told the court that he was not aware that Nadarajan had lodged a police report on 8 August 2006 that he was forced to sign a letter. He was also shown and did not agree with the contents of paragraphs 1 & 2 of Nadarajan's Statutory Declaration dated 2 August 2006.

THE DEFENDANT'S CASE

[28] The defendant, Ganga Tharan a/l Shanmugan ('DW 1'), holds a BSc in Building Economics and Quantity Surveying from Heriot-Watt University, Edinburgh. He had worked as a quantity surveyor at Gleeds Chartered Quantity Surveying in London for about three years before joining Juru Kos Chartered Quantity Surveyors in Subang Jaya. He then joined Aneka Pipecon as project manager overseeing water reticulation works. Based on this, the defendant told the court that he had been in the construction industry for more than 21 years.

[29] The defendant admitted that he did not really know the plaintiffs educational background but agreed that the plaintiff was not as educated as himself in terms of tertiary education.

[30] The defendant testified that he had aspired to start his own business in the water related field after being in the industry for about 10 years. He knew the plaintiff as a subcontractor of Aneka Pipecon operating under the name of Barcon Construction. It was the plaintiff who approached him on hearing that the latter was about to venture into his own business. Water Path was incorporated in November 1999.

[31] The defendant told the court that he chose the name Water Path because it was related to his own name. For the first one and a half years after the formation of the company, they had no business premises and operations was carried out from his own apartment.

[32] The initial paid up capital was RM5,000. The defendant held 51% of the shares whilst the plaintiff held 49%. He explained that he had more shares because he was the one who had wanted to start the company. The understanding between the parties was that the defendant would be responsible for the administrative work, tendering, finances, and business development whilst the plaintiff would handle the execution of the projects.

[33] The directors of Water Path were paid remuneration. No evidence was led on how much remuneration was paid. The defendant had savings as well as a current account with Standard Chartered Bank and was paid via cheques banked into his account. The plaintiff, on the other hand, insisted that he be paid by way of cash cheques. It was only later that the defendant found out that the plaintiff had been blacklisted by a financial institution.

[34] The defendant told the court that sometime in June 2004, he had approached BCBB for banking facilities. The Kuala Sidin project which they had secured required the company to provide a performance bond. BCBB later informed him that the plaintiff had been blacklisted and that Water Path would not be able to secure a facility so long as the plaintiff was still a director. The plaintiff did not deny the blacklisting. He was told to resolve his financial issues to enable Water Path to secure the banking facility but he did not even attempt to do so. Subsequently, the defendant told the plaintiff that if the company was to move forward, he could not be a director of the company.

[35] According to the defendant, it was the plaintiff who suggested that he resolve his financial issues by selling his shares. The defendant offered to buy them at RM1 per share but this was rejected by the plaintiff who wanted a higher price. Since the defendant did not counter with a higher figure, the plaintiff informed him that he would look for other parties to buy the shares at a higher price. However, several weeks later, the plaintiff agreed to accept the offer of RM1 per share. The defendant then sourced for funds to buy the shares.

[36] Initially, the defendant wanted to buy all 49% of the shares but the plaintiff wanted to keep a small percentage of the shares as he had been with the company since its inception. In the final analysis, a total of 115,000 shares representing 46% of the total shares of Water Path were sold to the defendant for RM115,000.

[37] The defendant told the court that he paid the plaintiff in cash for the shares. Tam Ngan Sang ('DW2') was a witness to the transaction. On the day in question, DW2 had come over to the office to meet with the defendant on project related matters at that time when the plaintiff and the defendant were about to execute the transfer forms. The defendant stated that he saw from the form that a witness was required and he invited DW2 to be a witness. He denied that DW2 was not present when the transfer forms were signed. He further denied that the RM115,000 was never paid to the defendant and that DW2 was not a witness to the payment. The cash, in denominations of RM50 and RM100, were placed in a computer bag. He saw the plaintiff check through the cash to satisfy himself. The plaintiff executed Form 32A of the Companies Act 1965 as well as the Director's Resolution. The share transfer forms appear at pp 15, 16 and 17 of AB1. The Company resolution for the sale of 17,000 shares is at p 19. The defendant was unable to find the company resolution for the sale of other shares. The court notes that a Director's Resolution for the transfer of two lots of 49,000 shares each from the plaintiff to the defendant signed by Nadarajan a/l Subramaniam ('DW3') and the defendant (DW2) was subsequently produced by DW3.

[38] During cross-examination, the defendant explained that he paid the plaintiff RM115,000 in cash at the request of the plaintiff. The plaintiff had claimed that he had issues with his bank and had wanted the payment in cash and not by cheque. As regards where he got the RM115,000 from, the defendant gave the following breakdown:

(a) RM20,000 from himself. He testified that he did not withdraw the money from the bank as he would normally have that amount of money in the house for business purposes;

(b) RM50,000 from Mr Chandra Sakaran;

(c) RM10,000 from Yugabalan s/o Subramaniam;

(d) RM20,000 from Mr Ravindran; and

(e) RM15,000 from Mr Ramamaday s/o Koyamboo.

He admitted that he did not have RM115,000 in his Standard Chartered account which was why he had to borrow from all these people.

[39] Nadarajan was then appointed as the new director of Water Path. The company resolution for this appointment appears at p 18 of AB1. The resolution is dated 6 August 2004 and is signed by both the plaintiff and the defendant.

[40] In May 2006, the defendant requested additional money for the sale of the shares that had taken place on 6 August 2004. The defendant refused to entertain the request because the sale had already been agreed upon and concluded. Instead, he offered to buy the remaining 3% of the plaintiffs shares. The plaintiff did not respond to the offer but instead started to intimidate and harass the defendant, his wife, the other director and the staff of Water Path.

[41] The defendant summarised the problems that were caused by the plaintiff as follows:

(a) On 17 July 2006, the plaintiff threatened the plaintiff's accounts executive, Ms Susela, at Water Path's office premises. The threat was to the effect that he would do something to her if she continued to work at Water Path. A police report was lodged by Ms Susela (p 45 of AB2);

(b) On 29 July 2006, the defendant received a phone call from Ms Susela informing him that the plaintiff had threatened to cause her bodily harm if he was not allowed to enter the office of Water Path. The defendant rushed to the office and found the laptop and cash of RM2000 missing, believed to be stolen by the plaintiff. The defendant lodged a police report (p 46 of AB2);

(c) On 8 August 2006, the plaintiff threatened Nadarajan a/l Subramaniam ('DW3') that he would be assaulted if he did not resign. The plaintiff also threatened DW3 to instruct the defendant to appoint him as a director;

(d) On or about 14 August 2006, the plaintiff went to the defendant's apartment and apologized for his behavior and harassment which had caused hardship to the defendant and his family. On the same night, the plaintiffs son, Govind a/l Udayakumar contacted the defendant and informed him that he intended to return the laptop which was stolen from the latter's office. However two days later, there was an attempted break in into Water Path's premises (report at p 52);

(e) On 26 July 2006, the plaintiff brought a parang and threatened the staff of Water Path to stop work. A police report was lodged by Tam Ngan Sang (p 58 of AB2);

(f) On 25 September 2006, 30 September 2006 and 2 August 2006, the defendant received threatening calls threatening injury to him and his family. He lodged a police report (p 47 of AB2);

(g) On or about 17 October 2006, at the premises of the Tamil Library, Sentul, the plaintiff threatened to hurt the defendant and also used vulgar words in the presence of others; and

(h) On 30 October 2006, when the defendant was coming out of his 11th floor apartment, he was confronted by the plaintiff and another Indian man. Whilst the Indian man held the defendant against the wall, the plaintiff assaulted and kicked him and threw him on the floor, thus causing damage to his camera and hand phone. The plaintiff also demanded a cash cheque for RM200,000. The defendant was then pushed into a lift and taken to the ground floor and throughout the journey he was repeatedly assaulted by the plaintiff and the other Indian man. He suffered injuries to his jaw, chin, lips, hands, left leg and body. A police report was lodged (p 49 of AB2).

[42] Following this series of harassments, the defendant obtained a restraining order from the High Court in 2008 which, inter alia, restrained the plaintiff from harassing him, his family and the staff of Water Path.

[43] The defendant denied shutting out the plaintiff from the office or physically stopping him from entering the office. He denied that the plaintiff saw him after 2004 to ask for the return of his shares. He also denied that the plaintiff had constantly asked him verbally to be reinstated as a director and for the return of his shares.

[44] The defendant testified that he and the plaintiff only stopped seeing each other in August 2006 and that up until that date, the plaintiff was still signing the company's cheques.

[45] The defendant confirmed that he was aware of an injunction against him not to dissipate the assets of Water Path until the disposal of the present case. The injunction was obtained after a contested case in the High Court.

[46] Tam Ngan Sang ('DW2') was the defendant's second witness. He describes his employment as a site supervisor and had been working with Water Path since the end of 2003. At the time of the hearing, he was still employed as a contractor for Water Path. His primary duties are to supervise the workers at the site. As such, most of his working hours are spent at the site although he would sometimes visit the office for administrative matters.

[47] With reference to the transfer forms, DW2 told the court that on 6 August 2004, he arrived at Water Path's office premises in Diamond Square at about mid-day for work purposes. Whilst he was in the office, the defendant called him to a separate room and explained that they needed a witness to the

sale of shares between him and the plaintiff. There were only three persons in the room — himself, the plaintiff and the defendant. Nadarajan was not in the room but was seated outside the room. DW2 testified that he saw the defendant pay the plaintiff a sum of RM115,000. After the plaintiff had counted *'kesemua wang tersebut'*, he witnessed first the plaintiff and then the defendant signing the form and he then signed as a witness. The court notes that during cross-examination, DW1 contradicted his earlier evidence that all the money were counted when he said that the plaintiff only counted a few stacks.

[48] DW2 also confirmed that on 23 September 2008 he had signed a statutory declaration (D1) to confirm that he had witnessed the sale of shares by the plaintiff to the defendant. During cross-examination, DW2 enlightened the court that his boss, the defendant, had asked him to prepare the statutory declaration and so he said 'yes'. The statutory declaration was actually prepared by his friend named Francis at DW2's home based on information given by DW2. It is material to note that although the forms were signed on 6 August 2004, the statutory declaration was only affirmed on 23 September 2008, more than four years later and only because the defendant had asked him to do so.

[49] DW2 also confirmed lodging the police report at p 58 of AB2. He lodged the report because he was told by his workers that on 26 July 2006, the plaintiff had threatened them to stop working and to leave the work site. He added that that was the second time that the plaintiff had threatened Water Path's workers. He lodged another police report (p 59 of AB2) complaining about the plaintiff abusing him with vulgar words at a food court on 14 May 2010.

[50] The defendant's third and last witness was Nadarajan a/l Subramaniam ('DW3'). In his witness statement he stated that he commenced work with Water Path in June 2004 as an 'accountant'. However, in the course of cross-examination, he told the court that he joined Water Path in the first week of May 2004. During cross-examination, it was also revealed that DW3 had a degree in Business Administration from UKM and was not a qualified accountant although he was working as an accountant in Water Path. His work involves preparing the final accounts of the company which he had been doing since 2004 to date. As such, he was a director of Water Path since 6 August 2004 but was also doing its accounts. DW3 admitted that the defendant is his 'boss' and that it was the defendant who had asked him to come to court to testify.

[51] DW3 testified that he knew the plaintiff who came occasionally to the office to collect his claims. As requested by the plaintiff, payments to him were

made either in the form of cash or cash cheques. He had never banked in any cheques for the plaintiff into his bank account as the plaintiff did not have any bank accounts.

[52] DW3 testified that he was appointed to the Board of Directors of Water Path on 6 August 2004 to replace the plaintiff. There were no conditions attached to his appointment. As regards the reason for his appointment, the court recorded the following answer during cross-examination:

> Yes, I know why I was appointed a Director. The Company wanted to obtain loans. So Ganga Tharan approached me to accept a directorship so that the Company can get the loan. *So I accepted for that purpose.* (Emphasis added.)

He added that he was appointed because he was the defendant's friend 'and he trusted me.'

[53] During cross-examination, DW3 was asked about the events of 6 August 2004. On the said date, he was in the office since 9am. The plaintiff came into the office at about 12 noon. Present in the office at the time were the plaintiff, the defendant, Susela, Tam Ngan Sang and himself. He admitted that he was not present when the Forms 32A were signed but was sitting outside. However, he claimed to know that the signing of Form 32A and the transfer of shares was taking place inside. He claimed that the defendant had told him that he was going to pay RM115,000 to the plaintiff although the defendant did not say where he had sourced the money from. He agreed that he did not ask and did not know why the defendant was paying the plaintiff in cash. He had not actually seen the money. All he saw was a black computer bag that was carried by the defendant and it was the defendant who told him that the money was in the bag.

[54] DW3 agreed that he did not ask the defendant for any acknowledgement of the RM115,000 received by the plaintiff. He offered the explanation that this was because no cheques were issued from the company's account.

[55] DW3 told the court that about two years after his appointment, the plaintiff started to harass him. The plaintiff called him several times in an abusive and threatening manner to demand that he resign as a director so that the plaintiff can then regain his post of director. The plaintiff was very persistent in his calls and started to threaten DW3, his two children and the defendant's children.

[56] DW3 testified that subsequently, the plaintiff promised to stop harassing him if he agreed to meet him. He agreed to meet the plaintiff 'As I was very concerned about the safety of my children and the defendant's children'.

He met the plaintiff at the Bangsar Shopping Centre on 27 July 2006. The plaintiff was accompanied by four other persons. There, DW3 was threatened into signing a letter which was prepared by the plaintiff.

[57] The court notes the following evidence of DW3 as regards his reasons for signing the letter:

> I agreed to sign the letter to avoid any problems with the plaintiff and my main concern was my safety and that of my children. I sincerely thought the plaintiff would stop harassing me since I had agreed to his request.

The letter was prepared and witnessed by Jaya Sangaran whom DW3 claimed to have met for the first time that day. He denied that he had met the said Jaya Sangaran previously at KFC Brickfields.

[58] DW3 would have the court believe that he was forced by the plaintiff into signing the said letter. As to how he was forced, DW3 gave the following answer:

> He called me more than 5 times on the phone. He threatened me by saying he will do something to my kids. Two nights he came to my house after 10 pm shouting in front of my house. On the last call he asked me to see him and he will stop harassing me.
>
> ...
>
> Yes, at the time in Bangsar Shopping Centre, I was threatened by Udayakumar verbally. He said that he can do what he threatened to do and harm my children. I signed because I felt threatened. I signed because he promised not to disturb me after that.

DW3 explained that he lodged a police report because the plaintiff had threatened him again.

[59] DW3 claimed that he did not know that the plaintiff was asking for his shares back or that he was asking to be reinstated. He claimed that it was only when the plaintiff called for a meeting that he knew. The court notes that DW3 then contradicted himself when he admitted that when the plaintiff made all the phone calls to him and came to his house, what the plaintiff had wanted was for DW3 to resign as a director.

[60] After he had signed the letter, he told the defendant about what had transpired and was advised to lodge a police report. DW3 testified that he was reluctant to do so as he was worried that the plaintiff may cause further problems. After further discussions with the defendant, he decided to affirm a statutory declaration on 2 August 2006 (D3). DW3 went to a commissioner of

oath with his own draft and she helped him to restructure the sentences. DW3 admitted that there was nothing in the statutory declaration about the plaintiff asking him to resign as director.

[61] On 8 August 2006, the plaintiff went to DW3's new office at Prima Damansara with three other Indian men and threatened to beat him up if he did not resign as a director of Water Path. DW3 immediately went to the police station and lodged a police report (p 69 of AB1). And despite the restraining order on him, the plaintiff called and shouted at DW3 on 2 November 2009 and 3 November 2009.

EVALUATION OF THE EVIDENCE AND FINDINGS

In coming to a decision in this case, the court has carefully considered the evidence adduced by both parties. It is undeniable that the evidence of the plaintiff and his witness is at complete and total variance with the evidence of the defendant and his witnesses. It is thus obvious that for the court to come to a just and fair decision in this case, the following issues would have to be considered, namely:

(a) Which of the two conflicting versions advanced by the disputing parties is acceptable to the court based on the evidence adduced; and

(b) If the finding is in favour of the plaintiff, whether the defendant was holding the 115,000 shares in trust for the plaintiff.

Formation of Water Path

[62] The court has carefully perused the evidence of the plaintiff and his witness. Although the plaintiffs evidence about his percentage of shareholdings appeared to be somewhat muddled in the beginning, to put it kindly, the court has endeavoured to dwell not solely on the inconsistencies but to weigh his evidence against all the other surrounding evidence. Whether the initial inconsistencies were attributable to his lack of an education up to tertiary level as submitted by his counsel or due to a lack of honesty, in the final analysis the court finds this to be unimportant taking into account that the initial percentage and amount of holdings of the parties at the time of formation of Water Path as well as the amount and percentage of shares transferred by the plaintiff to the defendant in August 2004 were not in dispute since they are agreed facts.

[63] As regards the issue of whether it was the plaintiff or the defendant who had started Water Path, the court finds that the evidence weighs in favour of the defendant. The fact that the defendant held 51% of the shares as opposed to 49% by the plaintiff as well as the fact that the business address of the company was the defendant's place of residence points to the defendant being the one

who had started the company. Further, the court notes that the defendant was never cross- examined as regards his evidence that it was he who had chosen the name of Water Path and that that name was related to his own name. The court finds that the reason given by the plaintiff for the defendant being given more shares was because he, the plaintiff, would profit from both Water Path as well as Barcon to be implausible. The court finds it both unbelievable and improbable that a person who starts a company would agree to someone else holding the majority shares notwithstanding that he may profit more from the formation of the said company. In the main, the court finds the defendant's version of how Water Path was first formed to be more plausible, namely that it was the defendant who had wanted to go into business on his own, and that it was the plaintiff who had wanted to join him.

Reasons for the transfer of the shares

[64] The court has carefully considered the evidence adduced as regards the reasons or basis for the transfer of the 115,000 shares. That Water Path was in need of banking facilities at the material time in order to carry out the jobs that it had secured from Kuala Sidin is not in dispute as this was also alluded to by the defendant in his evidence. According to the plaintiff, in June 2004, Water Path had applied for a RM1m loan from BBCB and RM500,000 from RHB Bank. When the loans were being processed, a credit check on the plaintiff showed that he was blacklisted. On or about June 2004, the plaintiff was only blacklisted although he agreed that he was later adjudged a bankrupt on 30 December 2004.

[65] What is pertinent are the events that followed. According to the plaintiff, he was informed by the defendant that the loans were rejected because he, the plaintiff, was blacklisted. However, the loans could be approved if a fresh application was made without the plaintiff as a shareholder and director. It was in light of these circumstances that steps were then taken to 'restructure' the company which resulted in his resignation as director and the transfer of 115,000 shares of Water Path from the plaintiff to the defendant. Nadarajan was appointed to replace the plaintiff as director. It is the plaintiffs case that this arrangement was to be a temporary one and that the defendant would hold the plaintiffs shares as trustee until the bank loans were approved or until such time when the plaintiff wanted it back. He was also to get back his director's position when the loans were approved or whenever he wanted.

[66] The defendant's version of the events which led to the transfer of the 115,000 shares would appear to be somewhat different. According to him, after it was discovered that the failure of Water Path to obtain banking facilities was a result of the plaintiff having been blacklisted, he told the plaintiff to resolve his financial issues. And later, when he found out that the plaintiff had

not even attempted to do so, he had told the plaintiff that he could not be a director of the company if the company was to move forward.

[67] If the defendant is to be believed, it was the plaintiff who first suggested that he resolve his financial issues by selling his shares. Initially, the defendant's offer to buy the shares at RM1 per share was rejected by the plaintiff. However, after he had failed in finding a buyer who was willing to pay more than RM1, he accepted the defendant's offer.

[68] As such, on this issue, the court finds that the reason for the transfer of the shares was to enable Water Path to secure banking facilities to carry out the Kuala Sidin project. The court finds that at the material time, the status of the plaintiff as one who was blacklisted was not conducive to his remaining as a director and shareholder of Water Path.

Was there a sale of the shares?

[69] It is the plaintiff's contention that the shares were not sold to the defendant and that no monies were paid for the transfer of the shares as the defendant was only to hold them temporarily. He does not dispute that he signed the three transfer forms but maintains that no monies changed hands.

[70] As such, it is clear that the issue as to whether a sale of the shares took place on 6 August 2004 would be the central issue in the determination of this case. If the plaintiff had sold his 115,000 shares to the defendant, it follows there from that he would have no further rights or claim over the said shares. If, on the other hand, there was only a transfer with no consideration given for the shares, the court will need to go on to consider the remedies, if any that are available to the plaintiff.

[71] It is true that the plaintiff was unable to produce any document that would reflect the alleged arrangement between him and the defendant to transfer the shares temporarily pending the approval of the bank loans. As the plaintiff puts it, it was only 'a verbal agreement and understanding'.

[72] The plaintiff asserts that the transfer forms were signed by him on 6 August 2004 in the company's office in Diamond Square and that only he and the defendant were present in the room at the material time. Notwithstanding that the transfer forms showed that the parties had signed in the presence of Tam Ngan Sang (DW2), the plaintiff admittedly did not lodge any police report to say that Tam had not witnessed his signature and neither did he take any steps to challenge the validity of the forms. The court looks at the plaintiffs

evidence that the transfer was 'done correctly' in the light of his claim that the transfer was only a temporary one as he had not sold his shares and had not received monies then or at any time.

[73] The court finds that the fact that the plaintiff did not lodge any police report to the effect that the shares were fraudulently transferred nor did he complain when asked to sign the attendance list for the fifth and sixth general meetings which he did not actually attend and which did not reflect that he had asked to be reinstated as a director are not inconsistent with his version of events. If his signing of the transfer forms is not in dispute and the reason for the transfer was to enable Water Path to obtain the much needed bank loans, it follows there from that it would not be very important whether Tam had actually witnessed his signature or otherwise at the material time. The court further notes that since the plaintiff was adjudged a bankrupt on or about the time of the approval of the loans, the issue about the re-transfer of the shares and his re-appointment as director should logically take a back seat so as not to jeopardise the bank loans or the disbursement of the monies.

Applicability of s 92 of the Evidence Act 1950

[74] In considering and giving due weight to the evidence of the plaintiff as regards to the circumstances under which he signed the transfer forms, the court is not unmindful of the provisions of s 92 of the Evidence Act 1950. The question to be considered here is whether the court can admit and consider the oral testimony of the plaintiff as regards the circumstances under which he signed the Forms 32A which shows on the face of the documents that he had transferred 18,000, 49,000 and 49,000 shares for a consideration of RM18,000, RM49,000 and RM49,000 respectively.

[75] Reference is made to the Federal Court case of *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 1 MLJ 89; [1979] 1 LNS 113 cited by learned counsel for the plaintiff where the Federal Court had occasion to consider the question of whether an oral promise could contradict a written agreement and be enforced. As held by Raja Azlan Shah, CJ (Malaya) (as His Highness then was):

> Although it is trite law that parol evidence is not admissible to add to, vary or contradict a written agreement, a technical way of overcoming the rule is by invoking the doctrine of collateral contract or collateral warranty. *Chitty on Contracts* (24th Ed) (para 674) puts it this way:
>
> An assurance given in the course of negotiation may therefore give rise to a contractual obligation, provided that an intention to be bound can be shown. The rules of evidence, however, frequently prevent such an assurance from being incorporated as part of a subsequent written agreement, since extrinsic evidence is as a general rule not admissible to vary or add to the terms of a written contract. As a result, the courts have been prepared in some circumstances to treat the assurance as

a separate contract, collateral to the main transaction. In particular, they will do so when one party refuses to enter into the contract unless the other gives him an assurance on a certain point.

In our view there is a growing body of authority which supports the proposition that a collateral agreement can exist side by side with the main agreement which it contradicts. The classic statement on collateral contract was made by Lord Moulton in *Heilbut Symons & Co v Buckleton* [1913] AC 30: 'It is evident, both on principle and on authority, that there may be a contract the consideration for which is the making of some other contract. If you will make such and such a contract I will give you one hundred pounds', is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect of their possessing to the full the character and status of a contract.'

[76] In the case of *Tan Chong & Sons Motor Co Sdn Bhd v Alan McKnight* [1983] 1 MLJ 220; [1983] CLJ (Rep) 394, His Lordship Salleh Abas FJ had this to say in relation to s 92 of the Evidence Act 1950:

There is this rule of evidence contained in s 92 of the Evidence Act 1950 to the effect that no oral evidence will be admissible to contradict, vary, add or subtract the terms of a written agreement unless the oral evidence comes within one of the exceptions or illustrations contained in the section. Counsel for the appellants therefore submitted that the representations having been orally made, whilst the agreement, namely the order, being in writing, the representations were therefore not admissible. The case of *Wong Wai Cheng v Attorney-General of Singapore* [1979] 1 MLJ 59 was referred to in the court below as an authority for the submission. That case, however, dealt with an attempt by a party to the contract to prove an implied term which would affect the terms of the written contract by relying upon pre-contract negotiations and statements. But the primary purpose — rather the dominant purpose — of proving the pre-contract statements in the case under the present appeal was not to contradict, vary, add or subtract terms of the order, but to prove the existence of a warranty, a separate contractual promise, although such proof resulted in a conflict between the warranty and the terms of the contract subsequently entered into. Such proof is obviously authorised by the provisions (b) and (c) and also illustrations (d), (g) and (h) of s 92. Perhaps, a short answer to the objection can be given in that the prohibition against admissibility of evidence under s 92 only applies where all — as opposed to some only — of the terms of the contract are written into the agreement. Thus where some terms are given orally and some in writing, oral evidence could be given to prove the terms agreed to orally. The expression 'When the terms of any such contract' at the beginning of s 92 must be read to mean 'When *all* the terms of any such contract'. *Damu Jadhao v Paras Nath Singh* [1965] 2 MLJ 38 at 39.

We therefore hold that the oral representations made by Mr Sze were admissible.

[77] Looking at the evidence of the plaintiff in the light of the authorities referred to above, the court finds that quite apart from Form 32A, the document of transfer, there was an agreement between the parties that the shares would be re-transferred at such time after the loans were approved or when the plaintiff wanted them back. It was for that reason that although the transfer documents include particulars of the consideration for the transfers, however no monies actually changed hands. The court finds that this agreement between the parties as regards the re-transfer of the shares constituted a collateral contract or agreement which is capable of existing side by side with the main contract. With the understanding that the shares would be re-transferred back to the plaintiff at some future date, the collateral agreement, albeit not in writing, would, to that extent, contradict the main agreement in respect of consideration not having been paid. It can also be argued that the transfer document did not contain all the terms of the agreement in that the agreement to re-transfer back the shares was not, and could not conceivably be included in the transfer document. As such, the court finds that oral evidence to prove the existence of other terms is admissible.

[78] Alternatively, the court finds the case falls within the proviso to s 92 in that the facts sought to be adduced by the plaintiff would prove that there was a 'want or failure of consideration' as the total of RM115,000 in respect of the three transfer documents were not paid. Thus, the court finds although the fact of execution of the transfer forms is not disputed, however since the validity of the document is challenged, parol evidence as regards the circumstances leading to and the arrangement or agreement between the parties at the time of execution of the documents are material and relevant and admissible.

Burden of proof and onus of proof

[79] A number of authorities have been cited by learned counsel for the defendant in relation to burden of proof and the onus of proof in civil cases. In the Federal Court case of *International Times & Ors v Leong Ho Yuen* [1980] 2 MLJ 86, His Lordship Salleh Abas FJ has set out succinctly the distinction between the expressions 'burden of proof' and 'onus of proof' as follows:

> For the purposes of this appeal it is necessary to bear in mind the distinction between the two senses in which the expressions burden of proof and onus of proof are used (*Nanji & Co v Jatashankar Dossa & Ors* 1961 AIR SC 1474 and *Raghavamma v Chenchamma* 1964 AIR SC 136). The first sense, signified by the expression burden of proof such as referred to in s 101 of the Evidence Act is the burden of establishing a case and this rests throughout the trial on the party who asserts the affirmative of the issue. The appellants in the present appeal relied on justification and fair comment. Therefore, the burden of proving these defences rests entirely upon them (*Gatley on Libel and Slander*, 7th Ed paras 351 & 354). The second sense referred to as onus of proof, on the other hand, relates to the responsibility of adducing evidence in order to discharge the burden of proof. The onus as opposed to burden

> is not stable and constantly shifts during the trial from one side to the other according to the scale of evidence and other preponderates. Such shifting is one continuous process in the evaluation of evidence. According to ss 102 and 103 of the Evidence Act, if the party with whom this onus lies whether initially or subsequently as a result of its shifting does not give any or further evidence or which gives evidence which is not sufficient, such party must fail. It is this onus that we are concerned with in the present appeal'.

And in the case of *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697, Augustine Paul JC (as he then was) observed as follows:

> It is settled law that the burden of proof rests throughout the trial on the party on whom the burden lies. Where a party on whom the burden of proof lies has discharged it, then the evidential burden shifts to the other party.... What shifts is the responsibility of adducing evidence to discharge that burden.... When the burden shifts to the other party, it can be discharged by cross-examination of witnesses of the party on whom the party lies or by calling witnesses or by giving evidence himself or by a combination of the different methods. No adverse inference can be drawn against that party for failure to give evidence himself. If he does not adduce any evidence when the burden has shifted to him, he will fail. If the party on whom the burden lies fails to discharge it, the other party need not call any evidence. In that event, it will not avail him to turn round and say that the respondent has not established his. In such circumstances, as the Privy Council observed in *Raja Chandranath Roy v Ramjai Mazumdar* 6 Bengal LR 303, the respondent can say 'It is wholly immaterial whether I prove my case or not. You have not proved yours'.

[80] Applying the above authorities to the facts of our instant case, the court finds that based on an evaluation of the evidence of the plaintiff, that the plaintiff has proved the existence of facts in favour of his case. As such, the burden shifts to the defendant to discharge his burden of proof.

The defendant's version of events

[81] The defendant's case is premised on his evidence that the 115,000 shares were not just transferred to him but that they were sold to him by the plaintiff and that a sum of RM115,000 changed hands. The court has heard the evidence of the defendant as to the failure of the plaintiff to resolve his financial difficulties and the plaintiffs own suggestion that he sell his shares to the defendant. The defendant's initial offer of RM1 per share was first rejected but when the plaintiffs attempts to get a higher price for the shares did not bear fruit, he agreed with the defendant's offer.

[82] The court notes the defendant's evidence that a total of 115,000 shares representing 46% of the total shares of Water Path were *sold* to him for RM115,000. The court further notes his evidence that the plaintiff executed the transfer documents in the presence of Tam Ngan Sang who allegedly also

witnessed the payment of the RM115,000 in cash. This evidence is in direct contradiction with the evidence of the plaintiff that he executed the transfer forms to transfer the shares temporarily and that no monies changed hands. In any event, only he and the defendant were present in the room at the time of the signing and as such Tam Ngan Sang could not have witnessed any payment of monies.

[83] The court has carefully weighed the two different versions of events. On one hand there is the evidence of the defendant supported by Tam Ngan Sang. If they are to be believed, the defendant had RM115,000 in denominations of RM50 and RM100 in a black laptop bag which was given to the plaintiff. The court notes that according to the defendant, the plaintiff checked through the cash to satisfy himself but this evidence is not consistent with the initial evidence of Tam Ngan Sang who testified that the plaintiff counted *'kesemua wang tersebut'* or all the money. Although he subsequently corrected himself during cross-examination when he sought to say that the plaintiff only counted a few stacks, the court finds Tam's evidence in this regard less than satisfactory. Bearing in mind the plaintiffs insistence that Tam was not in the room when the transfer forms were signed, and the fact that Tam is an employee of the defendant, the court would view the evidence of Tam as regards witnessing the payment of RM115,000 to the plaintiff with no small amount of skepticism. That a person would not count all the money allegedly paid also appears to be improbable.

[84] As regards the statutory declaration affirmed by Tam on 23 September 2008 to the effect that he had witnessed the sale of shares by the plaintiff to the defendant, it must be borne in mind that although the incident happened on 6 August 2004, the declaration was affirmed only on 23 September 2008, more than 4 years later and only because he was asked by his 'boss', the defendant, to do so.

[85] In light of this, the court has not placed much weight on the statutory declaration made after such a lengthy lapse of time. Instead, the court will weigh the evidence of Tam Ngan Sang as given in court and determine its intrinsic value in the light of all the surrounding evidence adduced.

Nadarajan's acknowledgement of 27 July 2006

[86] The court has also scrutinised the evidence adduced by Jaya Sangaran a/l Muniandy (PW2) as regards to the acknowledgment dated 27 July 2006 (p 68 of AB1). How much weight is the court to attach to this document? The document was prepared by Jaya Sangaran (PW2) at the request of the plaintiff and signed by Nadarajan. Admittedly, Nadarajan was not with Jaya Sangaran when the document was prepared as the latter had admitted to being alone in

his office when he prepared the text. The question arises: from where and whom did he get the information which forms the basis of this document?

[87] Although Jaya Sangaran claimed to have met the plaintiff and Nadarajan on a previous occasion at KFC Brickfields for the purpose of being told about what had transpired, this was strenuously denied by Nadarajan. Based on the totality of the evidence adduced in this regard, the court is more inclined to believe that there was no prior meeting at KFC Brickfields. If indeed the alleged meeting at KFC Brickfields was for the purpose of telling Jaya Sangaran about what had transpired, it would have been more logical and made more sense for Jaya Sangaran to have immediately recorded what Nadarajan had said and to have him acknowledge it immediately instead of arranging another separate meeting for the acknowledgement to be signed. The very nature of the document itself, being handwritten as opposed to typewritten, means that it could easily have been handwritten at KFC Brickfields if indeed there was such a meeting.

[88] And if there was no prior meeting at KFC Brickfields, the issue of the veracity of the contents of the document must next be considered. Jaya Sangaran had admitted that the text was prepared at the request of the plaintiff. Everything had already been prepared and Nadarajan had only to affix his name and append his two signatures and the date. The court confesses to some difficulty in comprehending this document for the following reasons:

(a) The use of the future tense ('will be replacing', 'will be transferred') points to the events not having occurred. The use of other words in the past tense such as 'requested' points to the event having already occurred. Was the deponent talking about information received before the events occurred or about events that had already occurred? If the event had already occurred, then the clear inaccuracy of the reference to *49%* of the paid up capital in Water Path does not make sense since at no time was *49%* of the paid up capital ever transferred to the defendant;

(b) The fact that the document was prepared long after the incident together with the inaccuracies in it begs the question of whether the contents of the document can be relied upon.

[89] In the final analysis, the court is of the view that bearing in mind the allegation of threats and duress under which this document was allegedly executed, the length of time that has elapsed since the alleged meetings and discussions and the presence of the personalities involved at the hearing, little or no weight should be placed on the document as a form of corroboration. Instead, as in the case of the statutory declaration of Tam Ngan Sang, the court will determine the case based on a proper regard and consideration of the evidence as adduced in court which can be tested through cross-examination.

Has the defendant rebutted the plaintiffs case?

[90] In the final analysis, after hearing the defence of the defendant and his witnesses, the court has to consider whether the defendant has successfully rebutted the plaintiff's case on a balance of probabilities. In the main, the issue is whether the defendant has successfully proven on a balance of probabilities that he had paid RM115,000 to the plaintiff for the 46% of the shares in Water Path and that a sum of RM115,000 had indeed changed hands. In this respect, the court has first perused the pleadings to examine what the parties had pleaded.

[91] A scrutiny of the 'pernyataan tuntutan' reveals that the plaintiff had always maintained that the transfer of his shares to the defendant was on a temporary basis until the loan was approved. Reference is made to:

(a) Para 8.3 which states that 'Plaintif akan memindahmilik sebanyak 115,000 saham-saham bernilai RM1 dan bersama 46%... daripada 49% saham-saham dalam Water Path kepada Defendan untuk sementara waktu sehingga kelulusan pinjaman bank yang dipohon oleh Water Path' clearly pleads that the transfer was on a temporary basis;

(b) Para 8.4 which states that 'Defendan akan memindah milik saham-saham plaintif tersebut dalam Water Path kepada Plaintif kembali selepas kelulusan pinjaman bank yang dipohon oleh Water Path tersebut' which envisages a re-transfer back of the plaintiffs shares;

(c) Para 14 which pleads that '*Defendan gagal untuk mengembalikan saham-saham Plaintif tersebut dalam Water Path... atau memberi plaintif nilai 49% saham-saham Water Path...* '. Although the reference to 49% was clearly in error since it is common ground that only 46% was ever transferred, it is nevertheless clear that the complaint is the defendant had failed to transfer back the shares.

[92] And how does the defendant respond? A scrutiny of the 'pernyataan pembelaan' reveals the following:

(a) In para 8, the defendant pleads that 'Plaintif telah bersetuju untuk melupuskan sahamnya iaitu 46%...'. And later on in the same paragraph he states 'Plaintif juga menandatangani semua dokumen-dokumen berkaitan dengan jualan saham tersebut';

(b) In para 9 he complains that '... Defendan cuba untuk menggambarkan bahawa jualan saham tersebut adalah tidak serius'. And in para 14, he pleads that the issue of his being a trustee does not arise because of the sale of shares ('jualan saham');

(c) In para 11 which was his reply to para 8.3 of the 'pernyataan tuntutan', the defendant again uses the words 'dilupus' and 'melupuskan' when he talks about the disposal of the shares. Similarly in para 18, he again uses the word 'melupuskan';

(d) in para 12 which was his response to para 8.4 of the 'pernyataan tuntutan', the defendant again refers to the plaintiff transferring his shares ('memindahkan sahamnya') although he did also plead that after the loan was approved, the plaintiff could buy the shares ('boleh membeli saham tersebut').

[93] The court notes that nowhere in his defence has the defendant actually pleaded that the plaintiff had sold the 115,000 shares to him for a sum of RM115,000. Nowhere has the defendant pleaded that a sum of RM115,000 had changed hands on 6 August 2004 and that because of this, the plaintiff had no more rights to the said shares. The court finds this fact extremely pertinent and telling as one would have expected that this was the most important and first line of defence which would have the effect of rendering impotent the plaintiff's case.

[94] The use of such ambiguous words such as 'melupuskan saham' and 'memindahkan saham' instead of pleading that the plaintiff had sold the shares for valuable consideration, namely RM115,000, casts doubts as to the defendant's claim. Further the fact that nowhere in any of the contemporaneous documents or police reports before the court has the defendant alluded to the payment of cash of RM115,000 to the defendant on 6 August 2002 raises questions as to the veracity of the defendant's claim that a sum of RM115,000 had been paid to the plaintiff.

[95] The court has also carefully perused the three transfer forms (Form 32A). Form 32A is the proper instrument of transfer prescribed under s 103(1) of the Companies Act 1965 to be used to register a transfer. Whilst it is true that the said form has a column for inserting the consideration sum in Malaysian Ringgit, the question that arises is whether the inserting of a consideration sum in a duly executed form constitutes or amounts to an acknowledgement of receipt of the said consideration sum.

[96] The defendant has cited the case of *Chan Yock Cher @ Chan Yock Kher v Chan Teong Peng* [2005] 1 MLJ 101 in support of his argument that the beneficial interest in shares passes to the purchaser of the shares upon full payment and execution of the transfer documents. The court has no hesitation in accepting and following the above cited Federal Court authority except for

the fact that the facts in Chan's case can easily be distinguished from the facts of our instant case. In *Chan Yock Cher Chan*, the decision was premised on the fact that 'the respondent had paid the RM270,000 in advance'. There was no dispute that the full purchase price was paid. This is different from the facts of the present case where the issue of whether the RM115,000 was paid to the plaintiff is one of the central issues upon which the case turns. As such, the court is of the view that the case of Chan Yock Cher does not support the defendant's contention that by virtue of the execution of the transfer documents, the beneficial interest in the 115,000 shares had passed on to him.

[97] In weighing the defendant's evidence that he had paid cash of RM115,000 to the plaintiff on 6 August 2004, the court has considered his evidence that he did not withdraw this amount of money from his bank account and in fact had agreed that at that point in time, he did not have RM115,000 in his Standard Chartered Bank account. The court has carefully considered whether his explanation that RM20,000 was his own money, and that he would normally have that amount of money in the house for business purposes, is plausible and reasonable. The court has also considered whether his explanation that he borrowed monies from Dr Chandra Sakaran (RM50,000), Mr Yugabalan s/o Subramaniam (RM10,000), Mr Ravindran (RM20,000) and Mr Ramamaday s/o Koyamboo (RM15,000) is plausible and reasonable. It is true that the defendant had wanted to call all these persons in support of his evidence that they had loaned him these monies. However, upon the court stating that it would be pointless in calling them if all they were going to say was that they had loaned him the monies without offering at least some ostensible proof of the loan and where the monies had come from eg bank statements, cheque stubs, bank books etc, and after due consultation with the defendant, the court was informed that the defendant would not be calling these persons as witnesses.

[98] The court finds the entire evidence about the payment of RM115,000 for the plaintiffs shares to be highly implausible and unbelievable for the following reasons:

(a) The failure of the defendant to plead from the outset that the 115,000 shares in Water Path were sold to him for RM115,000 and that RM115,000 had in fact been paid makes the subsequent evidence about the payment of the said sum in cash on 6 August 2004 highly suspect;

(b) The evidence of the money in cash being carried in a 'black computer bag' as testified by the defendant and corroborated by Tam Ngan Sang and Nadarajan a/l Subramaniam (DW3) smacks of complicity and

concoction. All three have used almost the exact same words although there was some inconsistency about whether the plaintiff had counted all the money in the bag;

(c) The defendant's evidence about having RM20,000 in cash conveniently lying around in the house 'for business purposes' and borrowing the balance of RM95,000 from four other persons appears quite unbelievable especially as none of the four would have been able to produce documentary or other proof of the source of the monies that they had loaned the defendant, hence their not being called to corroborate the defendant's evidence;

(d) However, the most important factor is the lack of a document acknowledging receipt of the RM115,000. The court is unable to believe that the defendant, an experienced businessman, would have paid RM115,000 in cash and not require the recipient to acknowledge receipt of the money. The court is unable to agree that the form of transfer of securities in Form 32A amounts to an acknowledgement of receipt of the consideration stated therein or that it amounts to proof that the said consideration sum was in fact received.

[99] Based on the above considerations, the court finds that the defendant has failed to prove, on a balance of probabilities, that he had paid RM115,000 in cash to the plaintiff for the latter's 46% shares in Water Path. The court finds that the defendant has failed to rebut the plaintiffs case that 115,000 shares in Water Path were transferred to the defendant on a temporary basis until the loan applications were approved. The court finds that the plaintiff has succeeded in proving, on a balance of probabilities, that the intention behind the transfer of the 115,000 shares in Water Path was to enable Water Path to secure the banking facilities necessary for it to carry out its projects. The court is satisfied that no monies changed hands and as such the transfer was effected without consideration.

CONCLUSION

[100] In conclusion, the court finds that that taking into account the totality of the evidence adduced in this case, the plaintiff has made out a case against the defendant on a balance of probabilities. As such, the court finds that the plaintiff is entitled to the declaration sought, that is, that the defendant is holding the 115,000 shares in Water Path in trust for the plaintiff. Further, the court finds that the plaintiff is entitled to the return of the said shares.

[101] Accordingly, the court allows the plaintiff's claim in respect of paras 17(a) and (b) and (f). In respect of para (b), the 115,000 shares are to be transferred back to the plaintiff within 10 days from the date of this judgment.

Plaintif's claim allowed in part.

Reported by Kohila Nesan